Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

MICHAEL FRANKLIN,

Petitioner,

v.

CITY OF BIRMINGHAM, a municipal corporation; JOHNNIE JOHNSON, JR., individually and in his official capacity as Police Chief of the City of Birmingham,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Was summary judgment improper where there was the existence of a genuine issue of material fact and the judgment was not supported as a matter of law?

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OPINIONS BELOW

There were no published opinions of the lower courts; however, the following non-published opinions were entered:

1. Memorandum opinion of United States District Judge Sharon Lovelace Blackburn was entered on February 10, 1998. (App. B).

2. Order affirming the district court without opinion was entered by the United States Court of Appeals for the Eleventh Circuit on November 12, 1998. (App. A).

STATEMENT OF JURISDICTION

The order of the United States Court of Appeals for the Eleventh Circuit which affirmed the district court without opinion was entered on November 12, 1998. The Petitioner's petition for rehearing was denied on December 11, 1998. (App. C).

Jurisdiction of this matter is conferred upon the United States Supreme Court by 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

1. 42 U.S.C. § 1981:

> All persons within the jurisdiction of the United States shall have the same right to every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and

> equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to another.

2. 42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

This case is an appeal from an order of the United States District Court for the Northern District of Alabama, Southern Division. The question before the court is whether the district court improperly granted the defendants' motion for summary judgment.

A. Course of the Proceedings Below

Michael Franklin filed a complaint in the United States District Court for the Northern District of Alabama on February 7, 1997. [R-1-1-1]. Federal court jurisdiction was based on 28 U.S.C. §§ 1331, 1343, and 42 U.S.C. §§ 1981, 1983. [R1-1-1]. Franklin's complaint was brought against the City of Birmingham, Alabama, and against Johnnie Johnson, Jr., both in his individual and official capacity as police chief for the City of Birmingham. [R-1-1-1]. Franklin alleged that the defendants violated his rights under the First and Fourteenth Amendment by terminating him from his job and otherwise harassing on the basis of the race of an alleged associate. Franklin also asserted that his contractual rights were violated as a result of these actions. The defendants filed their answer and set forth their affirmative defenses on March 3, 1997. [R-1-5-1]. On December 16, 1997, the defendants filed their Motion for Summary Judgment and Memorandum Brief in support thereof. [R-1-7-1, 1-9-1]. On December 17, 1997, Judge Blackburn entered an Order setting the motion for oral argument. [R-1-8-1]. On February 10, 1998, Judge Blackburn entered an Order granting the defendant's Motion for Summary Judgment. [R-1-11-1]. On February 11, 1998, the judge filed her Memorandum Opinion. [R-1-10-1]. The plaintiff, Michael Franklin, filed this appeal on March 12, 1998. [R-1-12-1]. The United States Court of Appeals for the Eleventh Circuit affirmed the judgment of the district court on November 12, 1998. The Petitioner filed a petition for rehearing on December 3, 1998. The Petitioner's petition for rehearing was denied on December 11, 1998.

STATEMENT OF FACTS

On February 3, 1995, Officer Michael Franklin was given notice that he was to appear on February 6, 1995 before Police Chief Johnnie Johnson, Jr., to respond to the allegation that he had been involved in a sexual relationship with a white female and that such contact had occurred during Franklin's lunch break. [R-1-7-1,2]. On February 9, 1995, Chief Johnson notified Franklin that a determination had been made to terminate Franklin from the police department. [R-1-7-3]. On February 17, 1995, Franklin appealed to the Jefferson County Personnel Board. [R-1-7-4]. The appeal was heard by the Personnel Board on April 27 and May 4, 1995. [R-1-7-8] During the hearing, it was determined that Franklin had been terminated under an outdated policy of the Birmingham Police Department. [R-1-7-8-105]. Under the correct rule, the actions of an employee during his/her lunch break are irrelevant to the performance of their duties and not subject to review or scrutiny by their officials. This updated rule had been revised by Chief Johnson prior to the incident in question. [R-1-7-8-106]. On May 15, 1995, the Personnel Board rendered a decision dismissing all charges related to the allegation of his involvements during his lunch break but suspended Franklin regarding other charges. [R-1-7-9]. On May 24, 1995, Franklin appealed the decision of the Personnel Board to the Circuit Court of Jefferson County. [R-1-7-10]. The court affirmed the order of the Personnel Board on December 13, 1995. Franklin filed a complaint in federal court on February 7, 1997. In his complaint, he did not admit to any relationship with the white female in question but asserted that his alleged contact with her was the basis for his termination. [R-1-1-1].

REASONS FOR GRANTING THE WRIT

On November 12, 1998, the United States Court of Appeals for the Eleventh Circuit affirmed, without opinion, the order of the United States District Court which granted summary judgment in this case. The memorandum opinion of the District Court stated th t summary judgment may not be granted simply because it goes unopposed. However, the court also held that the nonmoving party must respond by setting forth specific facts showing that there is a genuine issue for trial. If that party does not so respond, summary judgment shall be entered.

The Petitioner argues that the decision in this case contradicts itself and conflicts with such cases as *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2505, __, 91 L. Ed. 2d 202 (1986). That case held that trial courts should act with caution in granting summary judgment and should deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial. Summary judgment is not appropriate if the dispute about a fact is genuine, that is, if a reasonable jury could return a verdict for the nonmoving party. The Petitioner asserts that the standard presented by the district court in the case at hand and those articulated in similar published cases dealing with summary judgment are unclear and require further review and clarification. The Petitioner requests that the Supreme Court grant certiorari in this matter in order to clarify when an order granting summary judgment is proper and how much evidence must be presented by the nonmoving party in order to defeat a motion for summary judgment. Additionally, the Petitioner argues that there does exist a genuine issue of material fact as to several issues in this case.

I.

SUMMARY JUDGMENT

Under statutory law, district courts are empowered to grant summary judgment, upon proper motion, if there exists "no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). There are two distinct burdens placed upon the moving party by this rule. The moving party must first produce enough evidence to demonstrate the absence of any material fact. If such party meets this burden, summary judgment is appropriate only if such judgment is otherwise mandated as a matter of law. *Celotex Corporation v. Catrett*, 106 S. Ct. 2548, 2556 (1986). All doubts as to the existence of a material issue of fact must be resolved in favor of the nonmoving party. *Pickens v. Town of Brilliant*, 675 So. 2d 428 (Ala. Civ. App. 1995); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59, 90 S. Ct. 1598, 1608-09, 26 L. Ed. 2d 142 (1970). "If there is any evidence in the record from any source from which a reasonable inference in the [nonmoving party's] favor may be drawn, the moving party simply cannot obtain a summary judgment." *In re Japanese Electronic Products Antitrust Litigation*, 723 F.2d 238, 258 (1983). If the moving party establishes without any doubt that there are no disputed material issues, summary judgment is then only appropriate if the movant's version of the facts support a judgment in his favor when the law is applied. Unless it is clear that a trial is unnecessary, summary judgment should not be granted. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2505, __, 91 L. Ed. 2d 202 (1986).

When a court of appeal reviews a grant of summary judgment, the court must apply the same legal standards used by the district court since such review is plenary in nature. *Cable/Home Communication Corporation, M/A-Com, Inc., et al. v. Network Productions, Inc., et al.*, 902 F.2d 829, 841 (11th Cir. 1990); *Livernois v. Medical Disposables, Inc.*, 837 F.2d 1018, 1021-22 (11th Cir. 1988); *Carlin Communication, Inc. v. Southern Bell Tel. & Tel. Co.*, 802 F.2d 1352, 1356 (11th Cir. 1986). The reviewing court must first consider the undisputed, operative facts present in the case and view such in the light most favorable to the nonmoving party to determine whether such creates a genuine issue of material fact warranting trial. Second, if a trial is not warranted, the court must apply the controlling substantive law to such facts as were previously determined in order to determine if the district court's decision was correct as a matter of law. *Cable/Home Communication Corporation, M/A-Com, Inc., et al.*, 902 F.2d 829, 841-42 (11th Cir. 1990).

II.

QUALIFIED IMMUNITY

The Respondent, Johnnie Johnson, Jr., has raised the issue of qualified immunity in this matter. A state actor is not entitled to qualified immunity if his actions violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L. Ed. 2d 396 (1982). "Where an official could be expected to know that his conduct would violate statutory or constitutional rights, he should be made to hesitate . . ."

Id., at 819, 102 S. Ct. at 2738; *Mitchell v. Forsyth*, 472 U.S. 511, 522, 105 S. Ct. 2806, 2814, 86 L. Ed. 2d 411 (1985). The law requires only that the unlawfulness of the action taken be apparent for the official to lose the protection of qualified immunity. The action taken need not have been specifically ruled to be unlawful. The unlawfulness need only be one that can be inferred for pre-existing law by a reasonable person for immunity not to apply. *Mitchell* at 522, 105 S. Ct. at 2814. Under the facts of this case, the Respondent terminated the Petitioner from his employment after an allegation was made that the Petitioner, a black male, had a sexual relationship with a white female. R-7-1-2, 7-17-2. The rule which the Respondent applied to the Petitioner to justify his termination was an outdated procedure from the Birmingham Police Department Rules and Regulations. R-7-8-105. At the appeal hearing of this matter, it was determined that the current version of the procedure rendered the Petitioner's activities irrelevant. R-7-8-106. The Respondent is responsible for making new rules, revising old rules, and enforcing these rules as currently written. The Respondent argues that there is no evidence that the Petitioner was disciplined because of this race; however, that misstates the claim made by the Petitioner. The Petitioner's complaint alleges that he was disciplined as a result of his alleged involvement with a person of a different race, namely white. R-1-1-4. There is sufficient evidence from the undisputed circumstances surrounding the termination of the Petitioner to create a genuine issue of material fact as to the Respondent's intent for purposes of determining the existence of a constitutional violation. In addition, the action of terminating an employee, when motivated as a result of race, either of the employee or his associates is clearly unlawful.

III.

MUNICIPAL LIABILITY

The Respondent, City of Birmingham, argues that none of the injuries suffered by the Petitioner were the result of any municipal policy or custom. It contends that Respondent-Johnson is not the final policy maker with respect to the actions taken against the Petitioner. The Petitioner disagrees with this position. Johnson did in fact have final "policy-making" authority for the City of Birmingham. There is an important distinction which must be made between the actual policy making and the review, interpretation and enforcement of that policy. It is helpful in making this distinction to compare the functions and authority of the various city officials to those of our branches of federal government. Our laws in the United States are made by the legislative branch. They have final "policy-making" authority in our system of government. However, these laws are subject to review and interpretation by the judiciary. In our present fact situation, the Respondent-Johnson was responsible for setting the policy regarding the conduct of police employees and the punishments to be imposed for such violations. All Birmingham Police Department Rules and Regulations are signed by the police chief acting at the time such rule is made. In that fashion, the police chief acts in a legislative or policy-making role. When an employee is charged with a violation of a rule, the police chief is also responsible for the enforcement of the rule. R-7-1-1. The fact that the rules made and the manner in which they are applied is subject to review by the personnel board is much like a judicial function and does not negate the policy-making authority of the Respondent-Johnson. Under these circumstances, the single act of the

termination of the Petitioner would be sufficient to incur municipal liability.

Additionally, the policy of the City of Birmingham is well known in the community and has been well-established by custom. Numerous police employees have been subjected to harassment and discrimination as a result of city policy and have filed suit in the same district court as a result of their grievances. This discrimination has occurred primarily against white employees and females. However, discrimination on the basis of the race of a person's associates, as in this case, is equally unconstitutional. The Respondents should not be allowed to hide behind the fact that the perpetrator of the discrimination, Johnson, and the victim, Franklin, are of the same race in an effort to avoid liability.

IV.

RESPONDENT SUPERIOR DOCTRINE

Finally, the Petitioner argues for the modification of a well-established precedent. That issue is the availability of the doctrine of Respondent superior in certain types of cases. Although it has been thus far held that a municipality may not be held liable for its employees' violations of § 1981 under respondeat superior theory, the Petitioner hereby argues that this view is an incorrect and unfair interpretation of 42 U.S.C.A. §§ 1981, 1983. The Petitioner argues that the current status of the law regarding this issue renders § 1981 meaningless. Through decisions such as *Patterson v. McLean Credit Union*, 491 U.S. 164, 109 S. Ct. 2363, 105 L. Ed. 2d 132 (1989) and *Jett v. Dallas Independant School District*, 109 S. Ct. 2702 (1989), this important

legislature which was intended to protect "[a]ll persons within the jurisdiction of the United States" and ensure that they enjoy the "same right" and "the full and equal benefit of all laws and proceedings" has been nullified and disarmed so that it affords no civil redress at all. *Jett v. Dallas Independant School District*, 109 S.Ct. 2702, 2725-32 (1989) (Justices Brennan, Marshall, Blackmun & Stevens dissenting opinions); *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 105 S. Ct. 2427, 2442-47 (1985) (Justice Stevens dissent). Prior to the rulings in this group of cases, the existence of a cause of action through § 1981 was not questioned. The new line of reasoning was that § 1983 changed the cause of action previously afforded by § 1981. The Petitioner argues that this was clearly and explicitly not the intent of § 1983 in light of language providing "[t]hat nothing herein contained shall be construed to supersede or repeal any former act or law except so far as the same may be repugnant thereto." § 7, 17 Stat. 15. The Petitioner asserts that the current construction of these laws should be replaced by the interpretation originally adopted by the courts. The constitutional rights originally intended to be protected by these laws have been damaged by the current view of this law. Aggrieved citizens are not able to effectively enforce these rights within the means available to them under this interpretation. The Petitioner respectfully requests that this court revive the doctrine of respondeat superior for purposes of § 1981.

CONCLUSION

In this case, summary judgment is not supported as a matter of fact or law. The Respondents did not produce enough evidence to demonstrate the absence of any material fact. The United States District Court and the United States Court of Appeals for the Eleventh Circuit decided this case in such a manner as to necessitate a clarification of the standards to be applied when deciding the issue of summary judgment. Therefore, this Honorable Court should grant the Petitioner's petition for writ of certiorari for this purpose.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED NOVEMBER 12, 1998

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-6205
Non-Argument Calendar

D. C. Docket No. CV-97-B-334-S

MICHAEL FRANKLIN,

Plaintiff-Appellant,

versus

BIRMINGHAM, CITY OF, a municipal corporation; JOHNNIE JOHNSON, individually and in his official capacity as Police Chief of the City of Birmingham,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Alabama

(November 12, 1998)

Before TJOFLAT and EDMONDSON, Circuit Judges, and HENDERSON, Senior Circuit Judge.

Appendix A

PER CURIAM:

AFFIRMED. See 11th Cir. R. 36-1.[1]

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1. 11th Cir. R. 36-1 provides:

When the court determines that any of the following circumstances exist:

(a) judgment of the district court is based on findings of fact that are not clearly erroneous;

(b) the evidence in support of a jury verdict is sufficient;

(c) the order of an administrative agency is supported by substantial evidence on the record as a whole;

(d) summary judgment, directed verdict, or judgment on the pleadings is supported by the record;

(e) judgment has been entered without a reversible error of law; and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

APPENDIX B — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION DATED, ENTERED AND FILED FEBRUARY 10, 1998

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CASE NO. CV 97-B-0334-S

MICHAEL FRANKLIN,

Plaintiff,

v.

CITY OF BIRMINGHAM, a municipal corporation, JOHNNIE JOHNSON, individually and in his official capacity as Police Chief of the City of Birmingham,

Defendants.

MEMORANDUM OPINION

This matter is before the court on the unopposed Motion for Summary Judgment of defendants. Upon consideration of the record, the evidence submitted by the defendants, and the relevant law, the court is of the opinion that defendants' motion is due to be granted.

In this suit, plaintiff alleges that the defendants discriminated against him on the basis of race in violation of 42 U.S.C. § 1981. In addition, plaintiff contends that the

defendants deprived plaintiff of his rights under the First Amendment and Fourteenth Amendment of the U.S. Constitution as enforced by 42 U.S.C. § 1983.

On December 16, 1997, defendants filed the Motion for Summary Judgment presently before the court. On December 17, 1997, the court entered an order setting defendants' motion for summary judgment for oral argument on February 6, 1998.[1] Pursuant to Exhibit A attached to the court's Scheduling Order entered April 29, 1997, plaintiff's opposition brief and evidence were due 21 days after defendants' motion was filed. At the scheduling conference, Exhibit A and the briefing requirements with regard to dispositive motions was thoroughly explained to counsel by the court. Plaintiff did not file any evidence in opposition to defendant's Motion for Summary Judgment and did not submit to the court a brief in opposition.

Under Fed. R. Civ. P. 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The movant can meet this burden by presenting evidence showing that there is no dispute of material fact, or by showing that the nonmoving party has failed to present evidence in support of some element of her case on which she bears the ultimate burden of proof.

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1. Counsel for plaintiff showed up late for the hearing. With the court's permission, defendants' counsel had already left.

Celotex, 477 U.S. at 322-23; *see* Fed. R. Civ. P. 56(a) and (b). Once the moving party has met its burden, Rule 56(e) provides:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response . . . must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Thus, although a court may not grant a motion for summary judgment simply because the motion goes unopposed, it may do so if summary judgment is otherwise appropriate.

Applying the standards governing summary judgment to the facts of this case, the court concludes that there is no genuine issue as to any material fact, and defendants are entitled to a judgment as a matter of law. Plaintiff has not come forward with any evidence, much less evidence showing a dispute as to any factual contention of defendants. Thus, plaintiff has not only failed to meet his burden "to go beyond the pleadings and . . . designate 'specific facts showing that there is a genuine issue for trial,' " *Celotex*, 477 U.S. at 324, but also, and most importantly, the facts and law applicable to this case warrant a grant of summary judgment for defendants. Consequently, the court holds that the defendants' motion for summary judgment is due to be granted.

Appendix B

DONE this 11th of February, 1998.

s/ Sharon Lovelace Blackburn
SHARON LOVELACE BLACKBURN
United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION GRANTING MOTION FOR SUMMARY JUDGMENT DATED, ENTERED AND FILED FEBRUARY 10, 1998

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CASE NO. CV 97-B-0334-S

MICHAEL FRANKLIN,

Plaintiff,

v.

CITY OF BIRMINGHAM, a municipal corporation, JOHNNIE JOHNSON, individually and in his official capacity as Police Chief of the City of Birmingham,

Defendants.

ORDER

In accordance with the Memorandum Opinion entered contemporaneously herewith, it is hereby **ORDERED** that the motion of defendants for summary judgment is **GRANTED.** Additionally, the court hereby **DIRECTS** the Clerk of Court to file in the record defendants' Memorandum Brief in support of defendants' Motion for Summary Judgment. This action is **DISMISSED WITH PREJUDICE.** Costs are taxed against the plaintiff.

Appendix C

DONE this 10th day of February, 1998.

s/ Sharon Lovelace Blackburn
SHARON LOVELACE BLACKBURN
United States District Judge

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED DECEMBER 11, 1998

IN THE UNITED STATES COURT OF FOR THE ELEVENTH CIRCUIT

No. 98-6205

MICHAEL FRANKLIN,

Plaintiff-Appellant,

versus

BIRMINGHAM, CITY OF, a municipal corporation; JOHNNIE JOHNSON, individually and in his official capacity as Police Chief of the City of Birmingham,

Defendants-Appellees.

On Appeal from the United States District Court for the Northern District of Alabama

BEFORE: TJOFLAT and EDMONDSON, Circuit Judges, and HENDERSON, Senior Circuit Judge.

PER CURIAM:

The petition(s) for rehearing filed by Appellant, Michael Franklin, is denied.

Appendix D

ENTERED FOR THE COURT:

s/ Henderson
UNITED STATES SENIOR CIRCUIT JUDGE